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IN THE

Supreme Court of the United States

October Term 1976

No. 76-1640

GENERAL ATOMIC COMPANY, A partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

THE HONORABLE EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

GENERAL ATOMIC COMPANY, A partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

UNITED NUCLEAR CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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Opinions and Orders Below

This petition by General Atomic Company ("GAC") is a direct continuation of Cause No. 76-385, in which this Court granted GAC's petition seeking writs of certiorari directed to (a) the District Court of the First Judicial District, County of Santa Fe, New Mexico (the "Santa Fe Court"), to review its order of injunction dated April 2,

1976 (the "Injunction"), and (b) the New Mexico Supreme Court, to review its order entered June 16, 1976, in which that court quashed as improvidently granted an alternative (temporary) writ of prohibition directed to the Santa Fe Court, thereby leaving the Injunction in effect.

The Injunction restrains GAC and its constituent partners from exercising rights granted by the Federal Constitution, federal statutes and the Federal Rules of Civil Procedure:

> "General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto."

GAC's petition to this Court in Cause No. 76-385 (the "Prior Petition") asserted that the Injunction was in direct conflict with the Supremacy Clause and in particular with this Court's holding in *Donovan* v. *Dallas*, 377 U.S. 408 (1964).

On November 29, 1976, this Court granted the Prior Petition, vacated the judgment of the New Mexico Supreme Court and remanded the cause to that court to consider whether the judgment was based upon federal or state grounds, or both. On February 21, 1977, in response to the mandate of this Court, the New Mexico Supreme Court reaffirmed the judgment vacated by this Court and left

the Injunction in effect, holding that the Injunction was not in conflict with *Donovan*. Accordingly, GAC now seeks a writ of certiorari directed to the New Mexico Supreme Court to review that court's order rejecting GAC's constitutional claims.*

The Injunction of the Santa Fe Court is annexed hereto as Appendix A. That court set forth its reasons for granting the Injunction in a letter to the parties dated March 29, 1976, annexed hereto as Appendix B. This Court's mandate dated December 28, 1976, is annexed hereto as Appendix C. The opinion and order of the New Mexico Supreme Court entered on February 21, 1977, is annexed hereto as Appendix D.

Jurisdiction

The opinion and order of the New Mexico Supreme Court was entered on February 21, 1977.** This Court has jurisdiction to issue a writ of certiorari under 28 U.S.C. § 1257(3).

This Court remanded this cause to the New Mexico Supreme Court "to consider whether the judgment is based upon federal or state grounds, or both." The February 21, 1977, order and opinion of the New Mexico Supreme Court makes clear beyond any doubt that its decision to leave the Injunction in effect was squarely based on the federal ground presented by the Prior Petition. The New Mexico Supreme Court expressly decided that "the injunction here is not contrary to the Donovan holding" in

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* Since this Court's order and mandate did not expressly dispose of GAC's petition for a writ of certiorari directed to the Santa Fe Court, GAC also renews its request for such relief (*see* Prior Petition, p. 5).

** On March 4, 1977, the New Mexico Supreme Court entered an order making its February 21, 1977, order final.

concluding that the Santa Fe Court had jurisdiction to issue the Injunction (Appendix D, p. 9).

Questions Presented

1. Can a state court in an *in personam* action constitutionally enjoin a defendant from instituting an action in a federal court?

2. Can a state court in an *in personam* action constitutionally enjoin a defendant from impleading or moving to join the state court plaintiff as a party in a federal court action previously instituted against the defendant by a different party, pursuant to Fed. R. Civ. P. 14 or 19(a)?

3. Can a state court in an *in personam* action constitutionally enjoin a defendant from (a) seeking to enforce its rights under the Federal Arbitration Act to require the state court plaintiff to arbitrate or (b) asserting claims against the state court plaintiff in a pending arbitration ordered by a federal court pursuant to said Act?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved include U.S. Const. art. III, § 1, U.S. Const. art. VI, 28 U.S.C. § 2072 and 9 U.S.C. §§ 2 and 4, which provide in relevant part:

U.S. Const. art. III, § 1:

> "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. . . ."

U.S. Const. art. VI:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."

28 U.S.C. § 2072:

> "The Supreme Court shall have the power to prescribe by general rules the forms of process, writs, pleadings, and motions and the practice and procedure of the district courts and courts of appeals in civil actions . . . ."

9 U.S.C. § 2:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 4:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement,

would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . ."

Also involved are Fed. R. Civ. P. 14(a) and 19(a), which provide in relevant part:

Fed. R. Civ. P. 14(a):

"When Defendant may Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . ."

Fed. R. Civ. P. 19(a):

"Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

Statement

Litigation Prior to the Injunction*

The action below is one of several lawsuits arising from five contracts entered into by UNC and four utilities providing for the supply by UNC of uranium and uranium fuel assemblies ("the utility contracts"). Thereafter, GAC succeeded to UNC's rights and obligations under the utility contracts and, pursuant to a 1973 Uranium Supply Agreement, UNC became obligated to supply to GAC uranium required under the five utility contracts.** The 1973 Uranium Supply Agreement provides:

"UNC shall sell to the Corporation [GUNFC, now GAC] and the Corporation shall purchase from UNC all the Concentrates (including those concentrates to be used in reload fuel assemblies to be fabricated by the Corporation) which the Corporation is required to supply pursuant to the . . . [utility contracts]. . . . The Concentrates . . . shall be provided in accordance with the terms and conditions, including price, of the applicable [utility contract], as re-

* To avoid unecessary repetition, GAC respectfully refers the Court to the Prior Petition and to GAC's Prior Reply in Support of Petition (the "Prior Reply") for a more detailed statement of the relevant factual background to this action.

** The utility contracts were assigned by UNC to Gulf United Nuclear Fuels Corporation ("GUNFC"), formed by UNC and Gulf Oil Corporation ("Gulf"). In connection with the assignments, UNC guaranteed GUNFC's performance of the utility contracts, remained obligated to supply uranium to the utilities on three of the five contracts and entered into a Uranium Supply Agreement with GUNFC which obligated UNC to supply to GUNFC the uranium required on all five of the utility contracts. In 1973, Gulf bought out UNC's interest in GUNFC and the parties entered into a modified agreement, the 1973 Uranium Supply Agreement, which, *inter alia*, obligated UNC to supply to GUNFC uranium called for by the utility contracts. Thereafter, Gulf and Scallop Nuclear, Inc., formed GAC, and Gulf assigned to GAC its rights and obligations under the 1973 Uranium Supply Agreement and the utility contracts.

quired by the buyer and as specified in this Agreement."

In 1975, after a fivefold increase in the market price of uranium, UNC sought to avoid further performance of its obligations to supply uranium to GAC at contract prices. UNC withheld further delivery and brought a declaratory judgment action against GAC and its constituent partners in the Santa Fe Court, alleging, *inter alia*, mutual mistake, breach of contract and commercial impracticability.

GAC's great concern was to avoid the threat of inconsistent adjudications posed by the UNC litigation and UNC's refusal to supply the required uranium, on the one hand, and threatened litigation by the utilities seeking to compel GAC to perform the utility contracts originally made by UNC, on the other. GAC therefore promptly sought to have the entire controversy determined in a single federal forum. On January 19, 1976, GAC filed a complaint in interpleader and in the nature of interpleader pursuant to 28 U.S.C. § 1335 in the New Mexico Federal District Court. The complaint named UNC and the four utilities as defendants and sought determinations binding on all parties as to their respective rights and obligations under the 1973 Uranium Supply Agreement and the utility contracts.

Unfortunately, GAC's effort to obtain a consistent adjudication of the disputes among all of the parties was unsuccessful. On March 2, 1976, on motion of UNC and all of the utilities, the District Court dismissed the interpleader action on the ground that technical subject matter jurisdiction under the interpleader statute was lacking.*

* On April 8, 1977, the dismissal was affirmed by the United States Court of Appeals for the Tenth Circuit.

On January 23, 1976, Gulf had filed an action in the New Mexico federal court for a declaration of the validity of a release by UNC of certain claims against Gulf given in connection with Gulf's buy-out of UNC's interest in GUNFC. That action was dismissed on September 29, 1976, on the ground that the narrow issue presented by Gulf's action could be decided in the Santa Fe litigation.

Having successfully resisted GAC's effort to resolve the disputes in a single action, the utilities pressed their claims against GAC in separate forums. By early March 1976, the utilities had instituted the following litigation against GAC:

—*I&M v. GAC,* an action for damages and specific performance in New York federal court by the Indiana and Michigan Electric Company ("I&M");

—*Commonwealth Edison v. GAC,* a demand for arbitration and an action to compel arbitration in Illinois federal court by Commonwealth Edison Company ("Commonwealth"); and

—*Duke Power v. GAC,* a demand for arbitration in North Carolina by Duke Power Company ("Duke").

Neither I&M nor Duke attempted to join UNC in those proceedings, although UNC guaranteed performance of both utility contracts and remains directly liable to I&M on the I&M contract. Commonwealth, on the other hand, named UNC as a party along with GAC.

The Santa Fe Injunction

UNC, for its part, quickly moved to prevent GAC from impleading UNC in each of the utility proceedings, as GAC desired to do in order to avoid the threat of inconsistent adjudications in its disputes with UNC and each of the utilities. On March 15, 1976, warned by I&M that GAC might try to implead UNC in the New York federal action pursuant to Fed. R. Civ. P. 14, UNC obtained *ex parte* from the Santa Fe Court a temporary restraining order restraining GAC and its constituent partners from "instituting suit or filing a third-party complaint against United Nu-

clear".* On April 2, 1976, after hearing, the Santa Fe Court issued the Injunction.**

On April 14, 1976, GAC obtained an alternative writ of prohibition from the New Mexico Supreme Court, prohibiting the Santa Fe Court "from taking any action to enforce . . . [the Injunction] until the further order of this Court". However, on June 16, 1976, the New Mexico Supreme Court—immediately after argument and without giving any reasons—quashed the writ "as improvidently granted".

On September 14, 1976, GAC petitioned this Court for writs of certiorari to the New Mexico Supreme Court and the Santa Fe Court, seeking review of the Injunction and of the order of the New Mexico Supreme Court leaving the Injunction in effect. On November 29, 1976, this Court granted the Prior Petition and, without further briefing or argument, vacated the judgment of the New Mexico Supreme Court and remanded the cause to that court to consider whether its judgment was based upon federal or state grounds, or both. This Court's mandate was filed in the New Mexico Supreme Court on January 3, 1977.

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* I&M's warning initiated a curiously cooperative course of conduct towards UNC. In 1975, UNC had instituted an action against I&M in a different New Mexico state court, seeking to avoid its direct obligations to I&M under the I&M contract. After this action was removed by I&M to federal court, I&M counterclaimed to enforce the contract and for damages. Yet, on April 9, 1976, just days after UNC had obtained the Injunction, UNC and I&M agreed to an indefinite stay of the action by UNC against I&M. Thereafter, UNC and I&M sought to litigate against GAC only in separate forums and successfully resisted GAC's effort to intervene in the New Mexico federal action, in which UNC and I&M both were parties (*see* Prior Petition, pp. 10-15; Prior Reply, pp. 8-9).

** The federal interpleader action (which already had been dismissed) and Gulf's declaratory judgment action were exempted from the Injunction on the ground that those actions already were pending against UNC when the Injunction was sought. No exemption was made for the pending litigations instituted against GAC by I&M, Commonwealth and Duke, nor for the action instituted by UNC against I&M pending in New Mexico federal court.

In response to this Court's mandate, the New Mexico Supreme Court rendered its opinion and order of February 21, 1977, reaffirming its prior judgment on the ground that the Injunction did not conflict with *Donovan* and hence was within the inherent equity jurisdiction of the Santa Fe Court to issue.

Current Status of Utility Litigation

The course of developments in the pending litigations instituted by the utilities against GAC demonstrates that the Injunction has severely hampered GAC's efforts to defend itself. Indeed, the United States Court of Appeals for the Tenth Circuit, even while feeling constrained to affirm dismissal of the interpleader action, took pains to emphasize the prejudice to GAC caused by the piecemealed litigation:

> "We are acutely aware that the plaintiff finds itself in a most difficult trap. We are also aware that the public interest might well be served if all of the lawsuits could be brought together under a single roof. As the plaintiff points out, it is threatened with not only a number of lawsuits, but conflicting adjudications. The problem from our standpoint is that we must decide the case within the framework of the interpleader statute in view of the obvious limiting principle that federal courts are courts which are dependent upon Congress for the exercise of subject matter jurisdiction. The only jurisdictional offering is the interpleader statute and our decision must be made in terms of its specific criteria."*

I&M Litigation. GAC moved to dismiss the I&M action, pursuant to Fed. R. Civ. P. 19 and 14, on the ground

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* *General Atomic Co.* v. *Duke Power Co., et al.*, — F.2d — (10th Cir. No. 76-1152, filed April 8, 1977). A copy of the slip opinion of the United States Court of Appeals for the Tenth Circuit has been lodged with the Clerk of this Court.

that UNC was a necessary party who could not be joined because of the Injunction. That motion was initially denied by the New York federal court (*see* Prior Petition, pp. 10-11; Prior Reply, pp. 9-11). Thereafter, GAC renewed its motion to dismiss. Upon GAC's undertaking to attempt to join I&M in the Canta Fe action, Judge Frankel granted GAC's renewed motion. In an opinion dated January 5, 1977, Judge Frankel held that "[i]n equity and good conscience, the court cannot countenance the continuation of this lawsuit without the presence of UNC when to do so would likely result in duplicative litigation, possible prejudice, and incomplete resolution of the matters at issue."*

On January 21, 1977, I&M, at GAC's request, was ordered joined as a defendant in the Santa Fe action.

Thus, GAC ultimately was able to avert the threat of inconsistent adjudication posed by the Injunction against joinder of UNC in the I&M federal court action, but only by forsaking its right to litigate its disputes with I&M in a federal forum.

Detroit Edison Litigation. In view of prior instances in which a utility had sued GAC alone in one forum while UNC raised issues with respect to that utility in the Santa Fe litigation, GAC feared that Detroit would sue it in a Michigan court while GAC was restrained by the Injunction from impleading UNC. Accordingly, GAC moved on December 8, 1976, to join Detroit as a defendant in the Santa Fe action and, on January 21, 1977, such joinder was ordered. Detroit has appealed from this order, asserting that it is not subject to the jurisdiction of the Santa Fe Court. On December 18, 1976, Detroit in fact did bring an action in Michigan state court against GAC alone. However, on March 16, 1977, the court dismissed the action on GAC's motion, on the ground that UNC was a necessary party to the action whom GAC could not join because of the

* Judge Frankel's opinion dismissing the I&M federal court action is annexed hereto as Appendix E.

Injunction and dismissal was necessary to avoid prejudice to GAC from possible inconsistent adjudications. Detroit's motion for rehearing of the motion for dismissal is *sub judice*.

Since Detroit continues to resist joinder in the Santa Fe litigation and to press its action in Michigan state court, there is no assurance that GAC will be able to avoid inconsistent adjudication in the pending proceedings or in any subsequent proceedings.

Commonwealth Litigation. The Injunction has prevented GAC from asserting claims against UNC in the pending arbitration proceeding instituted against GAC and UNC by Commonwealth and ordered by the Illinois federal court pursuant to the Federal Arbitration Act.

The Commonwealth utility contract (to which UNC and GAC are parties) and the 1973 Uranium Supply Agreement between UNC and GAC both contain arbitration clauses requiring UNC to arbitrate disputes arising thereunder. Pursuant to these provisions, GAC contends that it is entitled to compel UNC to arbitrate disputes relating to price, quantity and other terms and conditions for uranium required under the Commonwealth utility contract.*

* The arbitration clause in the Commonwealth contract provides:

> "Any dispute arising from this Contract, including any failure to agree upon any matter where this Contract provides for future agreement of the parties, shall be submitted to arbitration on request of either party. One arbitrator shall be appointed by agreement of the parties or, in default of agreement, in accordance with the rules of the American Arbitration Association, which rules also shall govern the arbitration proceedings. The costs of any arbitration proceeding shall be borne equally by UNC and Purchaser unless the arbitrators find one of the parties' position in the dispute was not taken in good faith, in which case, such costs shall be assessed against that party except that each party shall be responsible for its own costs of preparing for such arbitration."

Commonwealth has demanded arbitration against GAC, Gulf and UNC of disputes arising under the Commonwealth contract. GAC, Gulf and UNC opposed this demand, but were ordered to submit to arbitration by the Illinois federal courts, pursuant to Section 4 of the Federal Arbitration Act. *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 400 F. Supp. 888 (N.D. Ill. 1975), *aff'd*, 541 F.2d 1263 (7th Cir. 1976).

The Commonwealth arbitration currently is proceeding even though the Injunction prevents GAC from asserting claims against its co-defendant, UNC, therein.

Duke Litigation. Duke also has demanded arbitration against GAC (but not against UNC) of disputes arbitrable under the Duke contract.* GAC opposed this demand on

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The arbitration provision in the 1973 Uranium Supply Agreement provides:

> "In the event that any disputes, which may arise between the parties during the course of this Agreement, cannot be mutually resolved, either party may elect to submit such disputes to arbitration in accordance with the Rules of the American Arbitration Association. Upon notice of such election, each party shall designate one member of the arbitration panel and the designees shall choose an impartial third member who shall chair the panel.
>
> "The panel shall hear and consider the position of each party and shall equitably resolve the dispute by a determination based on the terms and conditions of this Agreement. Such determination shall be final and binding on both parties and judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof."

* The arbitration clause in the Duke contract provides:

> "Any dispute arising from the contract shall be submitted to arbitration on request of either party. One arbitrator shall be appointed by each of the parties and a third arbitrator shall be appointed by agreement of the parties or, in default of agreement, in accordance with the rules of the American Arbitration Association, which rules also shall govern the arbitration proceedings. The costs of any arbitration proceeding shall be borne equally by Gulf United and Purchaser unless the arbitrators rule against one of the parties, in which case, such costs shall be assessed against that party."

the ground that UNC was a necessary party to any such arbitration proceeding, but was required to submit to arbitration, despite the absence of UNC, by order of a North Carolina federal court. *General Atomic Co.* v. *Duke Power Co.*, 420 F. Supp. 215 (W.D.N.C. 1976).

Neither Commonwealth nor Duke is a party to the Santa Fe litigation and neither can feasibly be joined therein because of the binding arbitration provisions contained in the respective Commonwealth and Duke utility contracts. In its answer to UNC's complaint in the Santa Fe action, filed on May 5, 1976, GAC demanded that UNC arbitrate issues relating to the Commonwealth and Duke contracts.*

Nevertheless, on March 25, 1977, the Santa Fe Court denied GAC's motion to dismiss or sever issues relating to the Commonwealth and Duke contracts—despite GAC's demand for arbitration, the absence of those utilities in the Santa Fe litigation and the pendency of arbitration proceedings against GAC by those utilities in separate forums.

Coupled with the Injunction, the effect of such denial has been not merely to deprive GAC of arbitration rights but also to enhance the prospect of inconsistent results in arbitration proceedings, on the one hand, and in the Santa Fe action, on the other.

Reasons for Granting the Writ

The fundamental issue of constitutional law presented by this Petition is the same as that presented by the Prior Petition: The direct conflict between the Injunction and the principles of federal supremacy explicated by this

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* Because of the Injunction, GAC could not demand arbitration against UNC other than in the Santa Fe litigation.

Court in *Donovan* (*see* Prior Petition, pp. 11-20; Prior Reply, pp. 11-13).

This Court granted the Prior Petition and, without more, vacated the judgment of the New Mexico Supreme Court, remanding only "to consider whether the judgment is based upon federal or state grounds, or both".

This Court's grant of certiorari on the Prior Petition reflects the importance of the federal question presented. Since the New Mexico Supreme Court now has expressly held that it left the Injunction in effect because it deemed *Donovan* inapposite, the issue of federal supremacy previously judged worthy of review on writ of certiorari should now be decided on the merits. On the merits, the judgment of the New Mexico Supreme Court is plainly contrary to the constitutional principles of federal supremacy enunciated in *Donovan* and should be summarily reversed.

The order and opinion of the New Mexico Supreme Court on remand has conclusively refuted UNC's argument that the judgment might not have been based on federal grounds (*see* UNC's Brief in Opposition (the "Prior Opposition"), pp. 3-5; Prior Reply, pp. 2-5). That court expressly decided the precise federal question presented by the Prior Petition. It held that "[t]he issue considered in Donovan is not present in the instant case and the rationale for that decision is inapplicable to the facts before the [Santa Fe Court]", that "the [Santa Fe Court] did not run afoul of the dictates of Donovan", that "the injunction here is not contrary to the Donovan holding" and, finally, that "the [Santa Fe Court] could properly issue such an injunction to include all forums whether state or federal"

(Appendix D, pp. 8-10).* In short, the New Mexico Supreme Court squarely held that a state court constitutionally may enjoin a party from seeking access to federal proceedings, contrary to the clear mandate of *Donovan*.

1. ***The Injunction Unconstitutionally Inhibits Petitioner's Access To And Rights In Federal Courts.*** The Injunction has denied and continues to deny the constitutional rights of GAC and its constituent partners both to institute proceedings in federal courts and to defend themselves in on-going proceedings instituted by third parties. The Injunction, moreover, poses a substantial threat to constitutional rights of other prospective litigants. Until this Court acts, the Injunction will remain in effect and the New Mexico courts, at least, will persist in limiting the mandate of *Donovan*.

No lengthy discussion is necessary to demonstrate the fallacies of the New Mexico Supreme Court's attempt to distinguish *Donovan*.**

A. The New Mexico Supreme Court attempts to restrict *Donovan* to proceedings where federal jurisdiction had attached prior to issuance of the state court injunction (Appendix D, pp. 8-10). This restriction is both contrary

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* The court's statement that "[a]s a matter of state law, we hold that, under these circumstances, a district court has inherent equity power to order such a restraint" (Appendix D, p. 7) merely summarizes that court's conclusion that *Donovan* is not applicable to the circumstances of this case and thus does not restrict the power, otherwise said to be vested by state law in the Santa Fe Court, to issue the Injunction. In other words, the court held that (1) under state law, state courts have inherent equity power to prevent allegedly vexatious or oppressive litigation and (2) *Donovan* does not restrain the particular exercise of that power by the Santa Fe Court in the circumstances of this case.

** The parties dealt extensively with *Donovan* in connection with the Prior Petition (Prior Petition, pp. 11-20; Prior Opposition, pp. 18-28; Prior Reply, pp. 11-12). The New Mexico Supreme Court essentially adopted the position taken by UNC (*compare* Appendix D, pp. 6-10, *with* Prior Opposition, pp. 17-28).

to the rationale of *Donovan* and flatly inconsistent with its holding. *Donovan* involved two different federal actions, one instituted *prior* to and one instituted *after* issuance of the injunction. The injunction prohibited both further prosecution of the pending federal action and institution of any new action. Contempt citations were issued by virtue of both further prosecution (by appeal) of the pending action and the filing of a *new* federal action. *City of Dallas* v. *Brown*, 368 S.W.2d 240 (Tex. Ct. App. 1963). Twenty-six of the original federal court plaintiffs, including Donovan, were cited for contempt *solely for instituting a new federal action after the state court injunction had been issued.* This Court reversed *all* of the contempt citations, those based on initiation of a new federal action as well as those based on further proceedings in a pending federal action (*see* Prior Petition, pp. 17-20; Prior Reply, p. 12).

B. The New Mexico Supreme Court also opined that because two federal actions were exempted from the Injunction, "any further federal action would be based on the same issues and events for the purpose of harassment" (Appendix D, pp. 6-7). This speculation completely ignores the fact that the interpleader action was dismissed *prior* to issuance of the Injunction and the very narrow Gulf declaratory judgment action was dismissed almost five months prior to the court's opinion on remand (*see* p. 8, *supra*).* But more importantly, it defines as "harassment" the efforts of GAC, an unwilling defendant, adequately to defend itself by impleading UNC, both in federal court and in arbitration ordered by federal courts pursuant to federal law (*see* pp. 11-15, *supra*).*

* The court recognizes that the only threatened "harassment" was the possibility that "GAC would try to bring UNC into the I & M suit and the Duke arbitration case and any other suit involving the utilities" (Appendix D, pp. 4-5). Thus the Injunction immunizes UNC, GAC's supplier, from involvement in litigation brought against GAC by the utilities, GAC's customers, notwithstanding that it is *UNC* that originally entered into each of the contracts involved in such litigation as part of a multi-million dollar enterprise (*see* Prior Reply, pp. 5-9).

To suggest that such impleader of UNC would constitute "harassment" simply manifests a determination to confine GAC's disputes with UNC to the New Mexico state courts, regardless of the violence done to the Supremacy Clause.**

In any event, the views of state courts about the propriety of recourse to the federal courts are totally irrelevant. Under the Supremacy Clause, state courts are

* The Court of Appeals for the Tenth Circuit, in contrast, stated that it was not "blind to the serious problem created by the posture adopted by United Nuclear". *General Atomic Co.* v. *Duke Power Co., et al.*, — F.2d — (10th Cir. No. 76-1152, filed April 8, 1976).

** We believe it fair to say that the New Mexico Supreme Court has not yet manifested an understanding of how the Injunction has prejudiced GAC's constitutional rights. That court's prior judgment leaving the Injunction in effect was rendered immediately after oral argument. On remand from this Court, the New Mexico Supreme Court declined GAC's suggestion that the issues be further briefed and argued, although only one of the four justices who rendered the opinion on remand had sat on the prior panel. That court thus did not have the benefit of the parties' views concerning either this Court's disposition of the Prior Petition or the continuing effect of the Injunction on GAC in proceedings outside New Mexico. Perhaps that is the reason why the New Mexico Supreme Court made the surprising statement that GAC could "raise any issue that is being litigated in the state court" in the interpleader action and the Gulf declaratory judgment action (Appendix D, p. 9)—which, contrary to the court's statement (Appendix D, p. 4), did not raise "the same issue" as the interpleader action.

The New Mexico Supreme Court evidences great concern about the "interest of comity" when it considers state court injunctions which would proscribe "instituting . . . another action in the same state or in a sister state" because that would "interfere with the exercise of jurisdiction of the neighboring court" (Appendix D, p. 6). In contrast, it blandly asserts, without discussion, that the Injunction here, to the extent it enjoins instituting *federal* proceedings, "does not offend any interest of comity" (Appendix D, p. 9).

utterly without power to deny access to federal proceedings or to curtail the nature or number of claims that a party may seek to assert in such proceedings (see *Donovan*; *see* Prior Petition, pp. 11-20; Prior Reply, pp. 11-12). Such determinations are left to the federal courts, which are well equipped to prevent unfair harassment.*

C. The New Mexico Supreme Court also ignored the fact that federal jurisdiction had already attached as to GAC in the action brought by I & M against GAC in New York, before the Injunction was issued. It simply ignored the great prejudice imposed by the Injunction in eliminating GAC's federal right to implead UNC in the New York action and to bind UNC to the result of the I & M—GAC—UNC contract controversy in that forum.

2. *The Injunction Unconstitutionally Deprives Petitioner Of Its Federal Rights To Arbitration Of Disputes.* The effect of the Injunction has not been limited to federal court litigation. As recent developments have made clear, it also prevents GAC from defending itself in federal arbitration proceedings instituted by a utility against GAC, denies to GAC its substantive federal right to enforce agreements to arbitrate and again subjects GAC to the risk of inconsistent adjudications in separate proceedings.

In the Commonwealth arbitration proceeding, for example, Commonwealth seeks to compel specific performance by GAC (and UNC) of a utility contract originally made with UNC, while in the Santa Fe litigation against

* It is impossible to enumerate in advance all possible occasions in which GAC or its constituent partners may need to exercise their rights to assert claims in federal proceedings. To date, federal proceedings brought by utilities are the only proceedings outside New Mexico in which GAC has expressed an intention to assert claims against UNC (*see* Prior Reply, pp. 5-9). Under *Donovan*, in any case, a state court may not preclude the exercise of those rights for any reason.

GAC alone, UNC seeks to avoid performance of its obligation to supply to GAC the uranium required by GAC for performance of the utility contract. It is GAC's (and UNC's) position that the Commonwealth contract has been terminated. But if the arbitrators find that contract to be enforceable, and also find that GAC is required to supply the uranium thereunder at the contract price, it is imperative that this determination against GAC also be binding on UNC. This is because UNC contends in the Santa Fe Court that UNC's obligations under the 1973 Uranium Supply Agreement are contingent upon GAC's obligations to the utility involved and UNC also contends in the Santa Fe Court that GAC is not obligated to perform the utility contracts.*

The Federal Arbitration Act makes the arbitration provisions in the utility contracts and in the 1973 Uranium Supply Agreement "valid, irrevocable, and enforceable" as a matter of substantive federal law. 9 U.S.C. § 2. Indeed, the Illinois federal courts have already specifically found that the Commonwealth contract is governed by the Federal Arbitration Act and have ordered GAC, Gulf and UNC to arbitrate with Commonwealth pursuant to Section 4 of the Act. 541 F.2d 1263 (7th Cir. 1976). However, although GAC, Gulf and UNC are all parties to the arbitration pursuant to federal court order, and although GAC has demanded that UNC arbitrate its disputes with GAC regarding GAC's obligations under the Commonwealth contract,

* GAC cannot avoid the risk of inconsistent adjudication by protective measures in the Santa Fe Court. Commonwealth and Duke cannot be made parties to that litigation because of their arbitration rights. Yet the Santa Fe Court has recently denied GAC's motion to dismiss or sever the Commonwealth and Duke contract issues from that litigation, notwithstanding the absence of those utilities from the action, the pendency of the arbitration proceedings raising those issues in other forums and GAC's demand for arbitration of those contract disputes (*see* pp. 13-15, *supra*).

UNC has thus far avoided such arbitration by reason of the Injunction, since GAC is prevented from demanding arbitration in the proceeding itself or from requesting the federal court to compel such arbitration.*

The effect of all of this is that GAC cannot so much as approach a federal court to seek vindication of its federal arbitration rights. The effect, furthermore, is to prevent GAC from obtaining a unitary, consistent determination of its rights and obligations under the Commonwealth contract, binding on all of the parties concerned, including UNC. GAC may therefore face the ultimate absurdity in which the arbitrators may find that GAC is obligated to deliver to Commonweath at contract prices, while the Santa Fe Court might hold, on the contrary, that GAC is not so obligated, and on that very ground excuse UNC from performance to GAC. This unconscionable risk has already led both the I&M federal court and the Detroit Edison state court to dismiss those utility claims in favor of the lesser prejudice of relegating all parties to the Santa Fe Court. However, even that result is not available in the case of utilities entitled to arbitration.

It bears emphasis that the rights created by the Federal Arbitration Act are not merely procedural, but are rights of a substantive nature. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-06 (1967); *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F.2d 1263 (7th

* The federal court would have subject matter jurisdiction of such a proceeding. Under the Act, such jurisdiction exists if the court, save for the arbitration agreement, would have jurisdiction of the subject matter of a suit arising out of the parties' controversy. While there is not diversity of citizenship between GAC and UNC, the court in an impleader context would have ancillary jurisdiction. *See, e.g., Stemler* v. *Burke*, 344 F.2d 393 (6th Cir. 1965); *Agrashell, Inc.* v. *Bernard Sirotta Co.*, 344 F.2d 583 (2d Cir. 1965). *See also* Prior Petition, pp. 14-15. *See also* footnote, p. 23, *infra*.

Cir. 1976). The Act manifests a Congressional policy of facilitating arbitration whenever possible and, under the Supremacy Clause, state law may not be used to curtail or limit rights under the Federal Arbitration Act.* *Prima Paint*, 388 U.S. 395, 405-06. For example, in *Grand Bahama Petroleum Co.* v. *Asiatic Petroleum Corp.*, 550 F.2d 1320 (2d Cir. 1977), the Court of Appeals for the Second Circuit recently held that a foreign corporation's right to institute a federal action to compel arbitration could not be defeated by a state statute requiring payment of state fees and taxes as a condition to bringing suit. The court held that the state law could not be applied so as "to frustrate the petitioner's access to a federal forum to litigate an admittedly federal matter and thereby limit the uniform and effective application of a federal statute. . . ." 550 F.2d at 1326.

But this is just what the Santa Fe Court is attempting to do. The Injunction purports to arrogate to the Santa Fe Court itself the sole power to determine disputes whose arbitrability is guaranteed by federal law. The Santa Fe Court has no such power, as indeed the Court of Appeals for the Seventh Circuit made clear in the *Commonwealth Edison* action in refusing to apply state law "which shifts the determination of disputes from arbitrators to courts", 541 F.2d at 1269, or which requires dismissal of an action

* Even where there is no federal jurisdiction, there is a growing body of state court authority recognizing that, since the rights created by the Federal Arbitration Act are substantive federal rights, the Supremacy Clause requires state courts to enforce those rights in state court actions regardless of inconsistent state law. *See, e.g., Litton RCS, Inc.* v. *Pennsylvania Turnpike Comm'n*, 376 F.Supp. 579, 591 n.21 (E.D. Pa. 1974), *aff'd*, 511 F.2d 1394 (3d Cir. 1975); *Pathman Constr. Co.* v. *Knox County Hosp. Ass'n*, 326 N.E.2d 844 (Ind. Ct. App. 1975); *Rederi* v. *Dow Chem. Co.*, 25 N.Y. 2d 576, 307 N.Y.S. 2d 660, 255 N.E.2d 774, *cert. denied*, 398 U.S. 939 (1970); *Aerojet —General Corp.* v. *Non-Ferrous Metal Ref. Ltd.*, 37 App. Div. 2d 531, 322 N.Y.S.2d 33 (1971); *Miller* v. *Puritan Fashions Corp.*, 516 S.W. 2d 234 (Tex. Ct. App. 1974).

when "there is another action pending between the same parties for the same cause", 541 F.2d at 1271. Thus, even apart from *Donovan*, recent precedents make it clear that the Injunction is plainly unconstitutional under the Supremacy Clause.

Donovan requires the same conclusion. There can be no doubt about the application of *Donovan* under these circumstances. *Donovan* prohibits state courts from enjoining access to federal proceedings of any sort. The Injunction here prevents GAC and its constituent partners from asserting claims provided for by federal law in an on-going arbitration proceeding ordered by federal courts and prevents GAC and its constituent partners from vindicating those rights in federal court, in clear contravention of a federal statute specifically providing for such an action in federal court.

Conclusion

This Court granted the Prior Petition, vacated the New Mexico Supreme Court judgment and remanded the cause only to ascertain whether or not the federal constitutional issue had been reached by the New Mexico courts. The New Mexico Supreme Court has now confirmed that it based its judgment on federal grounds, but chose to adopt the erroneous reading of *Donovan* devised by UNC.

There is no necessity here for full briefing. The outrage to federal supremacy is patent. For more than a year, the ever-widening circles of disruption caused by the Injunction have become increasingly evident. The Injunction has unconstitutionally hindered GAC's ability to defend itself in on-going litigation instituted by third parties, impeded access to federal courts and denied rights created by Act of Congress. The Injunction and its approval by the New

Mexico Supreme Court reflect an impermissably restrictive attitude toward the fundamental rights protected by the Supremacy Clause. For this reason, and for the other reasons stated above and in the Prior Petition and Prior Reply, GAC's Petition should be granted and the order of the New Mexico Supreme Court summarily reversed.

Respectfully submitted,

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May 23, 1977

APPENDIX A

Preliminary Injunction

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
a Delaware corporation,

Plaintiff,

v.

GENERAL ATOMIC COMPANY, a partnership composed of
GULF OIL CORPORATION and SCALLOP NUCLEAR, INC.

Defendants.

The above entitled cause having come on before the Court on plaintiff's application for a preliminary injunction prohibiting General Atomic Company or its partners, privies, agents, servants and employees from instituting or prosecuting any action or actions in any other forum, and notice having been given as provided by law, and the Court having considered all pleadings, affidavits, documentary evidence, briefs and argument of counsel, FINDS:

1. This Court's jurisdiction over the parties and subject matter of this action attached prior to the institution of any proceedings in any other forum involving the subject matter of this action.

2. In the interest of orderly procedure, the parties to this suit should have their rights, duties and liabilities determined by this Court.

3. A determination of this lawsuit may fully resolve the disputes between the parties, thus obviating any need for further litigation concerning the subject matter of this suit.

4. Plaintiff will be irreparably injured should the injunction prayed for not be granted in that defendant has admitted that unless restrained it will seek to file additional actions against plaintiff and plaintiff will have no adequate remedy at law in that the harm sought to be avoided by this injunction will have occurred.

5. The institution or prosecution of other legal proceedings by any of the parties to this action, or their privies, would be vexatious and harassing and would be multiplicitous litigation, all of which is contrary to the speedy and orderly administration of justice.

6. The inconvenience, amount of litigation, and expense which would be suffered by the parties if other proceedings are instituted or prosecuted will be reduced or eliminated if a preliminary injunction is granted.

7. There is currently pending in the United States District Court for the District of New Mexico a case entitled Gulf Oil Corporation v. United Nuclear Corporation, Civil No. 76-032-B. There is also currently pending before the United States Court of Appeals for the Tenth Circuit an appeal entitled General Atomic Co. v. Duke Power Company, et al., No. 76-1152.

8. No bond or security need be given by United Nuclear Corporation as this injunction merely maintains the status quo between the parties and this preliminary injunction will

benefit both parties in that the inconvenience and expense of multiplicitous litigation will be reduced or eliminated.

And the Court Concludes as matters of law that:

A. This Court has jurisdiction over the subject matter of this action and the parties hereto.

B. This Court has the authority to issue a preliminary injunction as requested by plaintiff and should do so, except, however, that this injunction shall not operate so as to forbid Gulf Oil Corporation from prosecuting the case entitled Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B in the United States District Court for the District of New Mexico, a cause pending at the time application for this preliminary injunction was made, and the prosecution of that appeal to the Tenth Circuit Court of Appeals entitled General Atomic Co. v. Duke Power Company, et al., No. 76-1152.

It Is Therefore Ordered that General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto. However, the case of Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B, currently pending in the United

Preliminary Injunction

States District Court for the District of New Mexico, is excepted from the operation of this preliminary injunction, as is the appeal currently pending before the Tenth Circuit Court of Appeals in General Atomic Co. v. Duke Power Company, et. al., No. 76-1152. The injunction herein against defendant shall bind Plaintiff to the same terms.

Submitted:

EDWIN L. FELTER
District Judge

HARRY L. BIGBEE
One of Pltfs. Attys.

WILLIAM FEDERICI
One of the Defendant's
Attorneys.

APPENDIX B

Opinion of Felter, *D.J.*

STATE OF NEW MEXICO

First Judicial District

March 29, 1976

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Re: United Nuclear Corp. v. General Atomic Co.
Santa Fe County #50827

Dear Sirs:

Consideration has been given to the pleadings, affidavits, testimony, briefs and arguments of counsel in the above-entitled and numbered case. Three issues are now before the Court for decision, namely:

1. Respondents' Motion to Dismiss for want of in personam jurisdiction over respondent.

2. Respondents' Motion to Dismiss for failure to join indispensable parties.

3. Plaintiff's application for a preliminary injunction.

I am of the opinion that this Court has in personam jurisdiction over respondents herein and that no defect in jurisdiction or otherwise exists by reason of any failure to join indispensable parties. Therefore, respondents motion to dismiss for lack of in personam jurisdiction and their motion to dismiss for failure to join indispensable parties are both denied.

Both parties made strong and convincing arguments of their respective positions upon plaintiff's application for a preliminary injunction. Either way the Court should rule on this issue would result in some inconvenience and expense to the losing party. I am satisfied that the Court has the authority to grant such a preliminary injunction except insofar as are concerned federal cases where the jurisdiction of the Court has already attached.

In the interest of orderly procedure, it occurs to me that the parties to this lawsuit should have their rights, duties and liabilities determined in this forum upon the merits of this case at the earliest possible date. Conceivably, such a determination could obviate in other forums, other litigation connected with the subject matter of this lawsuit. I believe that the sum total of inconvenience, litigation and expense, without analyzing which party to the greater extent may be affected thereby, can be ameliorated or reduced by the granting of the preliminary injunction. I believe that the ends of justice will be served better by the granting of the preliminary injunction than would be the case if it were refused. I am confident that once this case is decided on its merits,

irrespective of which party prevails, that any remaining rights, duties or liabilities between the parties and those of any other interested parties can be and will be settled or litigated appropriately.

Accordingly, respondents will be enjoined preliminarily, from filing or prosecuting any other action or actions against plaintiff in any other forum, relating to any of the rights, claims or subject matter of this lawsuit. The preliminary injunction shall include ordinary litigation, third party proceedings, arbitration proceedings and any and all other methods of prosecuting actions, claims, demands, etc. Jurisdiction of the District Court of the United States for the District of New Mexico already has attached in an action wherein Gulf Oil Corporation is plaintiff and United Nuclear Corporation is defendant. That case is excepted from the operation of the preliminary injunction hereby granted as required by Donovan v. City of Dallas, 377 U.S. 408, 84 S. Ct. 1579 (1964) rehearing denied 85 S. Ct. 14.

Counsel for plaintiff should submit to the Court for signature and filing an appropriate order consistent with the Court's ruling. Respondents may have twenty days from the date of entry of such order within which to plead to the merits or file such responsive pleadings as may be proper.

Very truly yours,

Edwin L. Felter
District Judge

ELF/ama

APPENDIX C

Mandate of the Supreme Court of the United States
Dated December 28, 1976

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO THE HONORABLE THE JUDGES OF THE
SUPREME COURT OF THE STATE OF NEW MEXICO,

Greetings:

WHEREAS, lately in the Supreme Court of the State of New Mexico, there came before you a cause between General Atomic Company, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc., petitioner, and Hon. Edwin L. Felter, District Court Judge for the First Judicial District, Santa Fe County, New Mexico, respondent, No. 10870, wherein the judgment of the said Supreme Court was duly entered on the sixteenth day of June A. D. 1976, as appears by an inspection of the petition for writ of certiorari to the said Supreme Court and the response thereto.

AND WHEREAS, in the 1976 Term, the said cause having been submitted to the SUPREME COURT OF THE UNITED STATES on the said petition for writ of certiorari and response thereto, and the Court having granted the said petition:

ON CONSIDERATION WHEREOF, it was ordered and adjudged on November 29, 1976, by this Court that the judgment of the Supreme Court of New Mexico in this cause be vacated, and that this cause be remanded to the Supreme Court of the State of New Mexico to consider whether the judgment is based upon federal or state grounds, or both. See California v. Krivda, 409 U.S. 33 (1972).

Mandate of the Supreme Court of the United States
Dated December 28, 1976

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said writ notwithstanding.

Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the twenty-eighth day of December in the year of our Lord one thousand nine hundred and seventy-six.

MICHAEL RODAK, JR.
Clerk of the Supreme Court
of the United States

No. 76-385

General Atomic Company,

v.

Edwin L. Felter, etc., et al.

APPENDIX D

Order and Opinion of the Supreme Court of the State of New Mexico Entered February 21, 1977

No. 10870

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

—0—

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

THE HONORABLE EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

—0—

PROCEEDINGS ON A WRIT OF PROHIBITION
AND RESPONSE TO MANDATE OF THE
UNITED STATES SUPREME COURT

RODEY, DICKASON, SLOAN, AKIN & ROBB

MODRALL, SPERLING, ROEHL, HARRIS & SISK
Albuquerque, New Mexico

MONTGOMERY, FEDERICI, ANDREWS, HANNAHS & BUELL
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Santa Fe, New Mexico

Attorneys for United Nuclear Corporation, a real party in interest.

Order and Opinion of the Supreme Court of the State of New Mexico Entered February 21, 1977

Opinion

McMANUS, Justice

General Atomic Company (GAC) applied to this Court for a writ of prohibition directed to the First Judicial District Court of New Mexico. That court had issued the following injunction:

> IT IS THEREFORE ORDERED that General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto. However, the case of Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B, currently pending in the United States District Court for the District of New Mexico, is excepted from the operation of this preliminary injunction, as is the appeal currently pending before the Tenth Circuit Court of Appeals in General Atomic Co. v. Duke Power Company, et al., No. 76-1152. The injunction herein against defendant shall bind Plaintiff to the same terms.

This Court granted an alternative writ on April 19, 1976 to consider the claims raised by GAC. After briefing and

Order and Opinion of the Supreme Court of the State of New Mexico Entered February 21, 1977

oral argument from counsel for GAC and United Nuclear Corporation (UNC) we quashed this writ as being improvidently granted on June 16, 1976. GAC then appealed this order to the United States Supreme Court. The United States Supreme Court, on December 28, 1976, issued its mandate with the following quoted directions to this Court:

> ON CONSIDERATION WHEREOF, it was ordered and adjudged on November 29, 1976, by this Court that the judgment of the Supreme Court of New Mexico in this cause be vacated, and that this cause be remanded to the Supreme Court of the State of New Mexico to consider whether the judgment is based on federal or state grounds, or both. See California v. Krivda, 409 U.S. 33 (1972).

Pursuant to the mandate of that Court, we set forth below the reasons for our actions in this matter.

UNC is in the business of mining and milling uranium. Approximately ten years ago UNC started manufacturing reload fuel and assemblies for nuclear reactors. It entered into a joint corporation, Gulf United Nuclear Fuels Corporation, with Gulf Oil Corporation (Gulf) in order to obtain additional capital. Gulf purchased UNC's interest in the joint corporation in 1973 and thereby acquired contracts to supply uranium to various power companies in the country. Gulf later entered into a partnership agreement with Scallop Nuclear, Inc. (Scallop) and formed the present General Atomic Company (GAC). Gulf assigned to GAC the utility supply agreements.

From 1967 to mid-1973 the market price of uranium was relatively stable at about $7.00 per pound and the

utility supply contracts were based upon that figure. Since 1973 the market price of uranium has increased to approximately $40.00 per pound. The value of the uranium in dispute is considerable in the eyes of everyone concerned.

UNC stopped delivery of the uranium in 1975 and filed a declaratory judgment action on August 8, 1975 against GAC and its constituent partners seeking to avoid its obligation under the contract. Gulf removed the case to the United States District Court for the District of New Mexico; UNC took a voluntary non-suit and filed again in state court naming only GAC as defendant.

UNC applied for a temporary restraining order on January 19, 1976 in the District Court of Santa Fe County, New Mexico, to prevent GAC from instituting any additional suits against UNC. This motion was denied. GAC filed a statutory interpleader in the United States District Court for the District of New Mexico on the same day naming UNC and four utility companies as defendants. On January 20, 1976 Gulf filed a suit in the same federal court against UNC on the same issue. (This suit was subsequently dismissed on a motion by UNC; the court declined to take jurisdiction because the issues could all be resolved in the state court proceeding.) Indiana & Michigan Electric Company (I & M) (one of the utility companies) filed suit in the United States District Court for the Southern District of New York against GAC and its partners on February 24, 1976. Duke Power Company (another utility) filed a demand on February 17, 1976 for arbitration proceedings against GAC on another uranium supply contract. On March 15, 1976 UNC again applied for a temporary restraining order and a preliminary injunction in the District Court of Santa Fe County, New Mexico after learning that GAC would try to bring UNC into the I & M suit and the Duke arbitration case and any other suit involving the utilities. After a hearing, the District Court granted the preliminary injunction restraining GAC, its partners, privies, agents, servants and employees from instituting any further legal action against UNC. The injunction was also applied to UNC. The District Court specifically excepted the federal action already proceeding[1] and the federal suit on appeal to the United States Court of Appeals for the Tenth Circuit.[2]

New Mexico Const. art. 6, § 3 grants to this Supreme Court the power to issue writs of mandamus, error, prohibition, habeas corpus and "all other writs necessary or proper for the complete exercise of its jurisdiction . . ." Prohibition is an extraordinary remedy which is granted only in limited circumstances at the discretion of the Court and is properly invoked to prevent an inferior court from acting either without jurisdiction or in excess of its jurisdition. State ex rel. Harvey v. Medler, District Judge, 19 N.M. 252, 142 P.376 (1914); Cal-M, Inc. v. McManus, 73 N.M. 91, 385 P.2d 954 (1963); State v. Tackett, 68 N.M. 318, 361 P.2d 724 (1961); State v. Carmody, 53 N.M. 367, 208 P.2d 1073 (1949). This writ should be issued sparingly and only where irreparable harm, extraordinary hardship, costly delays, or unusual burdens of expense would result. State v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966); Montoya v. McManus, 68 N.M. 381, 362 P.2d 771 (1961).

---

[1] Gulf Oil Corporation v. United Nuclear Corporation (D.N.M. No. 76-032-B)

[2] General Atomic Company v. Duke Power Company, et al., (D.N.M. No. 76-029-B); (10th Cir. No. 76-1152).

Prohibition, however, is not a substitute for an appeal nor can it be used merely to correct an erroneous decision of the district court. Baca v. Burks, 81 N.M. 376, 467 P.2d 392 (1970); State v. Coors, 52 N.M. 189, 194 P.2d 678 (1948). Therefore, in order to determine whether a writ of prohibition is appropriate, we must consider whether issuing the injunction was within the jurisdiction of the district court.

It is well settled that once a court has acquired jurisdiction over the parties and the subject matter, it may enjoin either party from instituting or proceeding with another action in the same state or in a sister state based upon the same facts and issues. Cole v. Cunningham, 133 U.S. 107 (1890). This principle rests upon the court's inherent equity power to prevent injustice. Baltimore & Ohio R. Co. v. Kepner, 314 U.S. 44 (1941). Most courts are reluctant to resort to such measures in the interest of comity, because even though the injunction acts in personam it operates to interfere with the exercise of jurisdiction of the neighboring court. James v. Grand Trunk Western Railroad Company, 14 Ill.2d 356, 152 N.E.2d 858, cert. denied, 358 U.S. 915 (1958). For that reason an injunction will not issue to prevent mere inconvenience or hardship, but rather is to be used when serious and grave reasons are present. Southern Pac. Co. v. Baum, 39 N.M. 22, 38 P.2d 1106 (1934). The prevention of vexatious, harassing and oppressive suits has been generally recognized as an appropriate basis for invoking this remedy. Allstate Insurance Company v. Hill, 218 Ga. 430, 128 S.E.2d 321 (1962); Boston & M.R.R. v. Whitehead, 307 Mass. 106, 29 N.E.2d 916 (1940); Poole v. Mississippi Publishers Corporation, 208 Miss. 364, 44 So.2d 467 (1950); John Hancock Mut. Life Ins. Co. v. Fiorilla, 83 N.J. Super. 151, 199 A.2d 65 (1964).

As the injunction applies to the institution of suits in other state courts, it was clearly within the power of the district court to restrain the parties from so acting. The Court found that further litigation was contemplated by GAC, irreparable injury would occur, there was no adequate remedy at law, further proceedings would be vexatious, harassing and multiplicitous, and that the inconvenience and expense of further proceedings would be reduced by granting the preliminary injunction. These findings give ample support for the court's order.

The thrust of GAC's challenge however, goes mainly to that portion of the injunction which restrains it from instituting further suits in federal court. GAC relies on Donovan v. City of Dallas, 377 U.S. 408 (1964) for the proposition that a state court is absolutely prohibited from interfering with the right of a party to bring multiple actions designed to harass and oppress its opponent so long as the party resorts to the federal forum. As a matter of state law, we hold that, under these circumstances, a district court has inherent equity powers to order such a restraint. We do not think that Donovan is applicable where a party is currently proceeding in federal court and where any further federal action would be based upon the same issues and events for the purpose of harassment. We do not believe that Donovan removes all equity powers from the jurisdiction of state courts whenever a party resorts to a federal forum.

In Donovan v. Dallas the plaintiffs had instituted a state court proceeding challenging the issuance and selling of municipal bonds for the expansion of a municipal airport. The case was tried and judgment was rendered for the city and upheld on appeal. The plaintiffs then filed an action

in federal court seeking the same relief. The city then obtained an injunction prohibiting the plaintiffs from continuing with the federal court action. Donovan and other plaintiffs appealed the dismissal of the federal suit and were convicted of contempt for violating the injunction. Upon review the United States Supreme Court stated the issue as follows:

> The question presented here is whether a state court can validly enjoin a person from prosecuting an action *in personam* in a district or appellate court of the United States which has jurisdiction both of the parties and of the subject matter.
> Supra at 408.

The Court then proceeded to answer this question in the negative. The bases for the decision were (1) the historical rule that state and federal courts would not interfere or try to restrain each other's proceedings, (2) that the petitioners had a right to bring such a suit in federal court and have that court decide the propriety of the state court's judgment and (3) that once jurisdiction has attached no other court may interfere with its exercise even though an in personam order was directed against the party.

The issue considered in Donovan is not present in the instant case and the rationale for that decision is inapplicable to the facts before the district court. The injunction which was issued does not directly or indirectly affect any proceeding in the district court or appellate courts of the United States where jurisdiction has attached. Those suits which were pending in federal court were exempted from the terms of the injunction. The injunction is directed only

towards the institution of future litigation wherein no federal or state court has yet to acquire jurisdiction.

GAC contends that this is a distinction without a difference but when the rationale behind the decision is applied to these facts we find that the district court did not run afoul of the dictates of Donovan. The injunction does not offend any interest of comity; the parties are not restrained from proceeding with the suits wherein the foreign court has exercised its jurisdiction. The district court carefully defined the parameters of the injunction to avoid such a conflict.

Donovan was also concerned with denying the petitioners access to the federal forum. Here no such right is being infringed. GAC has its case before two United States Courts —one district court and one appellate. GAC can raise any issue that is being litigated in the state court, and the federal court may hear all the questions on the merits; it is not limited to first considering whether the state decision is valid and the application of res judicata because no judgment has yet been rendered in the New Mexico district court. This right the Donovan Court tried to protect and the injunction here is not contrary to the Donovan holding.

The underlying issue before us is whether the district court may restrict the future acts of a party who is bringing vexatious and oppressive litigation in multiple jurisdictions for the purpose of harassment. Clearly, the party may be restrained from instituting future state actions; University of Texas v. Morris, 162 Tex. 60, 344 S.W.2d 426 (1961), and (before Donovan) some courts have held that the prohibition could encompass the federal courts too. Baltimore & Ohio R. Co. v. Kepner, supra; Wheeler v.

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Vimalert Co., 235 App. Div. 643, 255 N.Y.S. 114 (S. Ct. 1932); Poole v. Mississippi Publishers Corporation, supra. We feel that, in these circumstances where the considerations in Donovan are accomodated, the district court could properly issue such an injunction to include all forums whether state or federal.

Since we hold that the district court was acting within its jurisdiction in granting the injunction, this is not a proper case for the invocation of the remedy of prohibition, therefore, we will quash this writ as being improvidently granted.

IT IS SO ORDERED.

JOHN B. MCMANUS, JR., Justice

WE CONCUR:
DAN SOSA, JR., Justice
MACK EASLEY, Justice
H. VERN PAYNE, Justice

APPENDIX E

Opinion of Frankel, *J.* Dated January 5, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 881

———o———

INDIANA & MICHIGAN ELECTRIC CO.,

Plaintiff,

against

GULF OIL CORPORATION, et al.,

Defendants.

———o———

Appearances:

SIMPSON, THACHER & BARTLETT
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FRANKEL, D.J.

The court has before it two motions, one by the plaintiff seeking to amend its complaint by adding an antitrust claim, and a second by defendant essentially renewing its earlier Rule 19 motion which was denied on September 9, 1976. The court finds defendant's renewed Rule 19 motion to be compelling in light of events occurring subsequent to

the September 9th decision and is now persuaded that the complaint should be dismissed.

The instant suit between Indiana & Michigan Electric Company ("I & M") and General Atomic Corporation ("GAC") is one of three overlapping and interrelated actions involving these two parties and one other, United Nuclear Corporation ("UNC"). All arise from a connected sequence of contracts beginning with a 1967 uranium (crude and fabricated) supply contract between UNC and I & M, a contract which was subsequently assigned to a UNC-Gulf joint venture formed in 1971, then taken over by Gulf (GAC) when the joint venture was dissolved in 1973. In 1971, and again in 1973, prior to the dissolution of the joint venture, UNC and GAC negotiated uranium supply agreements designed, at least in part, to assist GAC in meeting its obligations under the assigned 1967 UNC-I & M contract, an obligation for which UNC was and is still jointly and severally liable. The other two actions, both brought by UNC, are pending in federal and state courts in New Mexico. The three actions do not raise precisely the same issues; nevertheless, in the instant action and *UNC* v. *I & M*, No. 75-561 (D.N.M.), the legal questions are very closely related, and the third, *UNC* v. *GAC*, No. SF-50827 (Dist. Ct. N.M.), will implicate many of the factual questions involved in the prior two.

GAC, both in September and now, has urged a dismissal of this action arguing that UNC is an indispensable party which cannot be joined because of an injunction of the New Mexico court precluding such joinder. This argument was rejected by the court in September, because it found UNC not to be technically indispensable and, more importantly, because this defendant, in spite of its suggestion that unitary adjudication could take place in one or more forums

in New Mexico, had not only taken no steps to bring about such a unitary action, but was at that very time challenging the assertion of jurisdiction over it in New Mexico.

Subsequent to the court's initial determination, there have been significant changes which have called into question the wisdom of the September order. First, GAC's amenability to the jurisdiction of the New Mexico state courts has been authoritatively determined, thus removing what this court had perceived as a serious obstacle to the possibility of a single lawsuit in New Mexico. Second, GAC has made two serious attempts to forge one lawsuit where all three of the interested parties could litigate their respective claims. On September 9, 1976, GAC sought to intervene in the action between UNC and I & M pending in the Federal District Court in Albuquerque. The effort failed, apparently because the action in which GAC hoped to intervene had been voluntarily stayed by agreement of UNC and I & M, and neither would act to dissolve the stay. Consequently, on December 8, GAC filed a motion with the New Mexico state court in Santa Fe where the UNC-GAC action is pending, to join as third-party defendants I & M and another utility company with related claims. No formal action has been taken by the state court on this motion, though in the course of argument before this court, I & M indicated its unwillingness to take an affirmative posture with regard to GAC's effort because it prefers this forum over one in New Mexico. Finally, though this is of only limited relevance to these proceedings, the judgment of the New Mexico Supreme Court upholding the injunction precluding GAC from suing UNC in any other forum was vacated by the United States Supreme Court and remanded to the New Mexico Supreme Court for clarification, pre-

serving the possibility that the injunction will ultimately be held invalid.[1]

There is no question about UNC's interest and involvement in the underlying dispute which forms the basis of this lawsuit. The legal issues raised in the UNC-I & M litigation in New Mexico appear substantially similar, if not identical, to those in this action. Indeed, counsel for UNC in its suit against I & M in Albuquerque Federal Court makes this point explicitly in a letter responding to GAC's motion to intervene in that action:

> "GAC and I & M are already engaged in litigation with each other in the Southern District of New York, No. 76 Civ. 881 (MEF). This lawsuit involves the same dispute that is the subject of GAC's attempted intervention here."

Further, counsel for I & M acknowledge, if somewhat begrudgingly and qualifiedly, that there are significant common questions of fact involved in this action and in *UNC* v. *GAC*, even if the legal issues are to some degree distinct.

In light of the criteria adumbrated in Rule 19(a), it seems abundantly clear that UNC is a party that should be joined if feasible. The more difficult question, and the

[1] The execution on October 20, 1976, of a document cataloguing agreement between UNC and I & M under which their respective discovery against GAC is made available to the other party has been cited by GAC as another factor which the court should consider in disposing of this motion. Specifically, GAC argues that such an arrangement bespeaks a "sweetheart agreement" between UNC and I & M, further evidenced by the stay of the action between them pending in Albuquerque, whose object is to force GAC to litigate in a forum where joinder of UNC is not possible. The court has found it unnecessary to sort out the various accusations relating to the UNC-I & M agreement; however, the agreement does underscore the substantial factual overlap between UNC's and I & M's suits against GAC.

one at issue between the parties, is whether UNC is an indispensable party in whose absence this action should not continue. Rule 19(b) outlines factors to be considered in resolving this question; however, the weight of these factors, along with others, must be determined on a case by case basis. See 7 Wright & Miller, Federal Practice and Procedure § 1608 at 66, 81-82. See also *McKenna* v. *Udall*, 418 F.2d 1171 (D.C. Cir. 1969); *Broussard* v. *Columbia Gulf Transmission Co.*, 398 F.2d 885 (5th Cir. 1968); *Holicky* v. *Selective Service Local Board No. 3, Denver, Colorado*, 328 F. Supp. 1373 (D. Colo. 1971); *Jones Knitting Corp.* v. *A.M. Pullen & Co.*, 50 F.R.D. 311 (S.D.N.Y. 1970).

In the context of the present action, the court now finds vitally important the last of the factors specified in Rule 19(b), the availability of an adequate remedy for plaintiff if the action is dismissed. The focus of this last factor is on the availability of an alternate forum in which all interested parties can be found and joined—a consideration which Professor Moore finds "clearly relevant and important in applying the 'equity and good conscience' mandate" of Rule 19(b). 3A Moore, Federal Practice 2263 & n.6. Several courts have found the availability of another forum not merely relevant and important, but actually dispositive of the question of indispensability. Judge McGowan, after pointing out that consideration of the first three factors would not warrant a dismissal under Rule 19(b), nevertheless concluded that:

> "Since appellant [plaintiff] has available another those possessed by the District Court, and in which forum with remedial powers equally as efficacious as all persons having an interest in the outcome of the

> litigation can be joined, the judgment dismissing the complaint is affirmed."

McKenna v. *Udall, supra,* at 1177. The district court in *Holicky* v. *Selective Service Local Board No. 3, Denver, Colorado, supra,* reached a similar conclusion. 328 F. Supp. at 1377. The facts of this case supply an even more compelling argument for dismissal because of the availability of alternate forums.

Specifically, despite plaintiff's cheerfully resigned view that this is "simply one of those disputes which must, unfortunately, be tried piecemeal", the court discerns that there are two forums in New Mexico, one state and one federal, where all of the parties can participate in a single litigation. In contrast to the situations in *McKenna* and *Holicky,* the forums in New Mexico are not merely available, but actions are already pending among all three parties raising related, if not identical, matters. GAC's efforts to constitute a single lawsuit by impleading I & M in the state court action (*UNC* v. *GAC*) or by intervening itself in the federal court suit (*UNC* v. *I & M*) have been resisted by UNC and I & M, thereby forcing piecemeal litigation. In equity and good conscience, the court cannot countenance the continuation of this lawsuit without the presence of UNC when to do so would likely result in duplicative litigation, possible prejudice, and incomplete resolution of the matters at issue.

The court is not unmindful of difficulties to be faced following a dismissal of the instant case. As plaintiff in its motion to amend its complaint points out, the federal courts have exclusive jurisdiction over antitrust claims: a decision affecting the three disputants in state court will likely leave the antitrust problem undecided. See *Lyons* v. *Westinghouse Electric Corporation,* 222 F.2d 184 (2d Cir. 1955). That concern is manageable, however; the federal court in Albuquerque, first seized of the general subject matter in the case between UNC and I & M, is an available forum for the antitrust claims. I & M should be able to achieve that outcome by ending its evident, if merely "passive," resistance to GAC's entry as a party to that case.

Finally, even if the three parties are together in a single lawsuit in the New Mexico federal court, the matters at issue between UNC and GAC may go unresolved because of the injunction of the New Mexico state court. As has been mentioned, that barrier may yet be removed. But even if it is not, the federal court is a preferable forum. At least, that earlier action, with GAC joined, can prevent prejudice and inconsistencies in the resolution of the common-law contract claims between I & M on the one hand and UNC and GAC on the other.

Defendant's motion to dismiss is granted. Plaintiff's motion to amend the complaint is denied. Settle an order.[2]

MARVIN E. FRANKEL
U.S.D.J.

Dated: New York, New York
January 5, 1976

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[2] The order to be settled should provide for fulfillment of the obligations undertaken by the parties pursuant to a consent order executed on May 19, 1976, providing for an interim uranium supply arrangement between plaintiff and defendant. It is to be hoped, therefore, that counsel will collaborate on an agreed form of order embodying both today's rulings dismissing the action and the continued performance under the order of May 19, 1976.